



## **ENVIRONMENTAL PROTECTION AGENCY**

**[EPA-HQ-OAR-2014-0036; FRL-9927-31-OAR]**

### **California State Nonroad Engine Pollution Control Standards; Small Off-Road Engines Regulations; Notice of Decision**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of Decision.

**SUMMARY:** The Environmental Protection Agency (EPA) is confirming that the California Air Resources Board's (CARB) 2008 amendments to its Small Off-Road Engines (SORE) regulation (2008 Amendments) are within the scope of previous EPA authorizations. The 2008 Amendments modify provisions through which manufacturers may generate and use emission credits to comply with SORE emission standards, and establish an ethanol blend certification fuel option. CARB's SORE regulations apply to all small off-road engines rated at or below 19 kilowatts (kW) (25 horsepower (hp)). This decision is issued under the authority of the Clean Air Act (CAA or Act).

**DATES:** Petitions for review must be filed by [INSERT DATE 60 DAYS AFTER

DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** EPA has established a docket for this action under Docket ID EPA-HQ-OAR-2014-0036. All documents relied upon in making this decision, including those submitted to EPA by CARB, are contained in the public docket. Publicly available docket materials are available either electronically through [www.regulations.gov](http://www.regulations.gov) or in hard copy at the Air and Radiation Docket in the EPA Headquarters Library, EPA West Building,

Room 3334, located at 1301 Constitution Avenue, NW, Washington, DC. The Public Reading Room is open to the public on all federal government working days from 8:30 a.m. to 4:30 p.m.; generally, it is open Monday through Friday, excluding holidays. The telephone number for the Reading Room is (202) 566-1744. The Air and Radiation Docket and Information Center's website is <http://www.epa.gov/oar/docket.html>. The electronic mail (e-mail) address for the Air and Radiation Docket is: [a-and-r-Docket@epa.gov](mailto:a-and-r-Docket@epa.gov), the telephone number is (202) 566-1742, and the fax number is (202) 566-9744. An electronic version of the public docket is available through the federal government's electronic public docket and comment system. You may access EPA dockets at <http://www.regulations.gov>. After opening the [www.regulations.gov](http://www.regulations.gov) website, enter EPA-HQ-OAR-2014-0036 in the "Enter Keyword or ID" fill-in box to view documents in the record. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

EPA's Office of Transportation and Air Quality (OTAQ) maintains a webpage that contains general information on its review of California waiver and authorization requests. Included on that page are links to prior waiver *Federal Register* notices, some of which are cited in today's notice; the page can be accessed at <http://www.epa.gov/otaq/cafr.htm>.

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## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

CARB first adopted standards and test procedures applicable to SORE in 1992. In 1993, CARB amended these regulations to delay their implementation until 1995. EPA authorized these initial SORE regulations in 1995.<sup>1</sup> California subsequently amended its regulations in 1994, 1995, and 1996 to clarify certification and implementation procedures, exempt military tactical equipment, and relax emissions standards for certain engines. EPA authorized these three amendment packages in 2000.<sup>2</sup>

In 1998, CARB amended the SORE regulation to apply to all engines rated less than 19 kW used in off-road applications. The 1998 amendments also revised the regulations to be based on engine displacement instead of whether the engine is used in a handheld or non-handheld application, delayed implementation of certain portions of the standards, and adopted new emission standards for new engines under 19 kW, consistent with the “Compression-Ignition Engine Statement of Principles” jointly entered into by CARB, EPA, and engine manufacturers in August 1996.<sup>3</sup> EPA found these amendments to be within the scope of the previously granted 1995 authorization.<sup>4</sup>

In 2000, CARB amended the SORE regulations by recodifying the requirements applicable to certain new compression ignition (CI) engines. EPA found this amendment to be within the scope of the previously granted SORE authorization.<sup>5</sup> In 2004, CARB amended its off-road CI regulations to match federal standards and exhaust emissions standards, and adopted evaporative emissions standards for spark-ignited (SI) small off-

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<sup>1</sup> 60 FR 37440 (July 20, 1995).

<sup>2</sup> 65 FR 69763 (November 20, 2000).

<sup>3</sup> 62 FR 200 (January 2, 1997).

<sup>4</sup> 65 FR. 69767 (November 20, 2000).

<sup>5</sup> 75 FR 8056 (February 23, 2010).

road engines rated at or below 19 kW. EPA granted full authorizations for these amendments in 2006.<sup>6</sup>

#### *A. California's Authorization Request*

On November 21, 2008, CARB approved three additional amendments to its SORE regulations<sup>7</sup>: (1) modification of certification emissions credits to limit their lifetime to five years, and to allow electric equipment (zero-emissions equipment or “ZEE”) to participate in the emission credits program; (2) modification of production emissions credits; and (3) establishment of an ethanol blend certification test fuel option, each of which will be addressed in turn.<sup>8</sup> CARB seeks confirmation that the 2008 Amendments are within the scope of EPA’s previous authorizations of CARB’s SORE regulations.<sup>9</sup>

According to CARB, the certification emissions credits program was established in 1998 to provide manufacturers with additional flexibility in certifying engines. The certification credits program enabled manufacturers to generate credits when they certified engines that were cleaner than the SORE emission standards, and use those credits to offset emissions from “dirtier” engine families that could otherwise not meet the standards. CARB expected that the program would help manufacturers comply with the new emission standards, while also encouraging early introduction of cleaner technologies.<sup>10</sup> However, while this program gave manufacturers flexibility, it did not result in use of advanced technologies at the anticipated pace. Manufacturers

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<sup>6</sup> 71 FR 75536 (December 15, 2006).

<sup>7</sup> The specific regulatory text enacted by the 2008 amendments is set forth in California Code of Regulations (CCR), title 13, sections 2401, 2403, 2405, 2406, 2408, 2408.1 and 2409.

<sup>8</sup> CARB Authorization Support Document, December 2, 2013, EPA-HQ-OAR-2014-0036-0003.

<sup>9</sup> *Id.* at 1.

<sup>10</sup> *Id.* at 4.

accumulated large credit balances, in part because the certification emission credits did not expire. CARB states that manufacturers were able to use banked emissions credits to certify “dirty” engines and delay implementation of cleaner technology, instead of using catalysts and other emission control technologies to reduce emissions on the more challenging engine families. Thus, CARB found that the original design of the emissions credit program slowed rather than promoted progress toward cleaner engines.<sup>11</sup> CARB’s amendments to the certification emissions credits within the 2008 Amendments cause the credits to expire five years after their creation. The 2008 Amendments also modify the certification emissions credit program to allow electric equipment to participate for the first time. ZEE manufacturers will be allowed to generate emissions credits for equipment that meets certain performance and design requirements. CARB anticipates this change will encourage manufacturers to develop professional-grade ZEE and allow manufacturers greater flexibility in their introduction of such equipment.<sup>12</sup>

CARB states that the production emissions credits, which manufacturers could convert to certification emissions credits, also contributed to an overabundance of the latter form of credits.<sup>13</sup> Under CARB’s earlier SORE regulation, manufacturers could generate production emission credits when a production engine’s emissions were below the applicable engine family emissions limit. CARB established the production credits program to help manufacturers offset compliance problems, but as of 2008, no manufacturer needed to use production credits for that purpose, using them instead to generate large certification emissions credit balances. The 2008 Amendments eliminated generation of production emission credits beginning in 2009, but allowed manufacturers

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<sup>11</sup> *Id.* at 6.

<sup>12</sup> *Id.* at 10.

<sup>13</sup> *Id.* at 11-12.

to convert production emission credits to certification emission credits for an additional year.<sup>14</sup>

Finally, CARB's amended SORE regulations permit manufacturers the option to use a certification fuel with up to ten percent ethanol content (commonly known as E10) if the same fuel is used for certification with EPA. CARB asserts that this will enhance harmonization with EPA's nonroad<sup>15</sup> certification procedures, and could reduce testing costs for some manufacturers.<sup>16</sup>

#### *B. Clean Air Act Nonroad Engine and Vehicle Authorizations*

Section 209(e)(1) of the Act permanently preempts any state, or political subdivision thereof, from adopting or attempting to enforce any standard or other requirement relating to the control of emissions for certain *new* nonroad engines or vehicles.<sup>17</sup> For all other nonroad engines (including “non-new” engines), states generally are preempted from adopting and enforcing standards and other requirements relating to the control of emissions, except that section 209(e)(2)(A) of the Act requires EPA, after notice and opportunity for public hearing, to authorize California to adopt and enforce such regulations unless EPA makes one of three enumerated findings. Specifically, EPA must deny authorization if the Administrator finds that (1) California's protectiveness determination (i.e., that California standards will be, in the aggregate, as protective of public health and welfare as applicable federal standards) is arbitrary and capricious, (2) California does not need such standards to meet compelling and extraordinary conditions,

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<sup>14</sup> *Id.* at 12.

<sup>15</sup> The federal term “nonroad” and the California term “off-road” are used interchangeably.

<sup>16</sup> *Id.* at 13.

<sup>17</sup> States are expressly preempted from adopting or attempting to enforce any standard or other requirement relating to the control of emissions from new nonroad engines which are used in construction equipment or vehicles or used in farm equipment or vehicles and which are smaller than 175 horsepower. Such express preemption under section 209(e)(1) of the Act also applies to new locomotives or new engines used in locomotives.

or (3) the California standards and accompanying enforcement procedures are not consistent with section 209 of the Act.

On July 20, 1994, EPA promulgated a rule interpreting the three criteria set forth in section 209(e)(2)(A) that EPA must consider before granting any California authorization request for nonroad engine or vehicle emission standards.<sup>18</sup> EPA revised these regulations in 1997.<sup>19</sup> As stated in the preamble to the 1994 rule, EPA historically has interpreted the consistency inquiry under the third criterion, outlined above and set forth in section 209(e)(2)(A)(iii), to require, at minimum, that California standards and enforcement procedures be consistent with section 209(a), section 209(e)(1), and section 209(b)(1)(C) of the Act.<sup>20</sup>

In order to be consistent with section 209(a), California's nonroad standards and enforcement procedures must not apply to new motor vehicles or new motor vehicle engines. To be consistent with section 209(e)(1), California's nonroad standards and enforcement procedures must not attempt to regulate engine categories that are permanently preempted from state regulation. To determine consistency with section 209(b)(1)(C), EPA typically reviews nonroad authorization requests under the same "consistency" criteria that are applied to motor vehicle waiver requests under section 209(b)(1)(C). That provision provides that the Administrator shall not grant California a motor vehicle waiver if she finds that California "standards and accompanying

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<sup>18</sup> See "Air Pollution Control; Preemption of State Regulation for Nonroad Engine and Vehicle Standards," 59 FR 36969 (July 20, 1994).

<sup>19</sup> See "Control of Air Pollution: Emission Standards for New Nonroad Compression-Ignition Engines at or Above 37 Kilowatts; Preemption of State Regulation for Nonroad Engine and Vehicle Standards; Amendments to Rules," 62 FR 67733 (December 30, 1997). The applicable regulations are now found in 40 CFR part 1074, subpart B, § 1074.105.

<sup>20</sup> See *supra* note 12. EPA has interpreted 209(b)(1)(C) in the context of section 209(b) motor vehicle waivers.

enforcement procedures are not consistent with section 202(a)” of the Act. Previous decisions granting waivers and authorizations have noted that state standards and enforcement procedures will be found to be inconsistent with section 202(a) if (1) there is inadequate lead time to permit the development of the necessary technology, giving appropriate consideration to the cost of compliance within that time, or (2) the federal and state testing procedures impose inconsistent certification requirements.

In light of the similar language of sections 209(b) and 209(e)(2)(A), EPA has reviewed California’s requests for authorization of nonroad vehicle or engine standards under section 209(e)(2)(A) using the same principles that it has historically applied in reviewing requests for waivers of preemption for new motor vehicle or new motor vehicle engine standards under section 209(b).<sup>21</sup> These principles include, among other things, that EPA should limit its inquiry to the three specific authorization criteria identified in section 209(e)(2)(A),<sup>22</sup> and that EPA should give substantial deference to the policy judgments California has made in adopting its regulations. In previous waiver decisions, EPA has stated that Congress intended EPA’s review of California’s decision-making be narrow. EPA has rejected arguments that are not specified in the statute as grounds for denying a waiver:

The law makes it clear that the waiver requests cannot be denied unless the specific findings designated in the statute can properly be made. The issue of whether a proposed California requirement is likely to result in only marginal improvement in California air quality not commensurate with its costs or is otherwise an arguably unwise exercise of regulatory power is not legally pertinent to my decision under section 209, so long as the California requirement is consistent with section 202(a) and is more

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<sup>21</sup> See *Engine Manufacturers Association v. EPA*, 88 F.3d 1075, 1087 (D.C. Cir. 1996): “... EPA was within the bounds of permissible construction in analogizing §209(e) on nonroad sources to §209(a) on motor vehicles.”

<sup>22</sup> See *supra* note 12, at 36983.



stringent than applicable Federal requirements in the sense that it may result in some further reduction in air pollution in California.<sup>23</sup>

This principle of narrow EPA review has been upheld by the U.S. Court of Appeals for the District of Columbia Circuit.<sup>24</sup> Thus, EPA's consideration of all the evidence submitted concerning an authorization decision is circumscribed by its relevance to those questions that may be considered under section 209(e)(2)(A).

### *C. Within-the-scope Determinations*

If California amends regulations that were previously authorized by EPA, California may ask EPA to determine that the amendments are within the scope of the earlier authorization. A within-the-scope determination for such amendments is permissible without a full authorization review if three conditions are met. First, the amended regulations must not undermine California's previous determination that its standards, in the aggregate, are as protective of public health and welfare as applicable federal standards. Second, the amended regulations must not affect consistency with section 209 of the Act, following the same criteria discussed above in the context of full authorizations. Third, the amended regulations must not raise any "new issues" affecting EPA's prior authorizations.<sup>25</sup>

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<sup>23</sup> "Waiver of Application of Clean Air Act to California State Standards," 36 FR 17458 (Aug. 31, 1971). Note that the more stringent standard expressed here, in 1971, was superseded by the 1977 amendments to section 209, which established that California must determine that its standards are, in the aggregate, at least as protective of public health and welfare as applicable Federal standards. In the 1990 amendments to section 209, Congress established section 209(e) and similar language in section 209(e)(1)(i) pertaining to California's nonroad emission standards which California must determine to be, in the aggregate, at least as protective of public health and welfare as applicable federal standards.

<sup>24</sup> See, e.g., *Motor and Equip. Mfrs Assoc. v. EPA*, 627 F.2d 1095 (D.C. Cir. 1979) ("MEMA I").

<sup>25</sup> See "California State Motor Vehicle Pollution Control Standards; Amendments Within the Scope of Previous Waiver of Federal Preemption," 46 FR 36742 (July 15, 1981).

#### *D. Deference to California*

In previous waiver decisions, EPA has recognized that the intent of Congress in creating a limited review based on the section 209(b)(1) criteria was to ensure that the federal government did not second-guess state policy choices. This has led EPA to state:

It is worth noting \* \* \* I would feel constrained to approve a California approach to the problem which I might also feel unable to adopt at the federal level in my own capacity as a regulator. The whole approach of the Clean Air Act is to force the development of new types of emission control technology where that is needed by compelling the industry to “catch up” to some degree with newly promulgated standards. Such an approach \* \* \* may be attended with costs, in the shaped of reduced product offering, or price or fuel economy penalties, and by risks that a wider number of vehicle classes may not be able to complete their development work in time. Since a balancing of these risks and costs against the potential benefits from reduced emissions is a central policy decision for any regulatory agency under the statutory scheme outlined above, I believe I am required to give very substantial deference to California’s judgments on this score.<sup>26</sup>

EPA has stated that the text, structure, and history of the California waiver provision clearly indicate both a congressional intent and appropriate EPA practice of leaving the decision on “ambiguous and controversial matters of public policy” to California’s judgment.<sup>27</sup>

The House Committee Report explained as part of the 1977 amendments to the Clean Air Act, where Congress had the opportunity to restrict the waiver provision, it elected instead to explain California’s flexibility to adopt a complete program of motor

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<sup>26</sup> 40 FR 23103-23104 (May 28, 1975); *see also* LEV I Decision Document at 64 (58 FR 4166 (January 13, 1993)).

<sup>27</sup> 40 FR 23104; 58 FR 4166.

vehicle emission controls. The amendment is intended to ratify and strengthen the California waiver provision and to affirm the underlying intent of that provision, i.e., to afford California the broadest possible discretion in selecting the best means to protect the health of its citizens and the public welfare.<sup>28</sup>

*E. Burden and Standard of Proof*

As the U.S. Court of Appeals for the D.C. Circuit has made clear in *MEMA I*, opponents of a waiver request by California bear the burden of showing that the statutory criteria for a denial of the request have been met:

[T]he language of the statute and its legislative history indicate that California's regulations, and California's determinations that they must comply with the statute, when presented to the Administrator are presumed to satisfy the waiver requirements and that the burden of proving otherwise is on whoever attacks them. California must present its regulations and findings at the hearing and thereafter the parties opposing the waiver request bear the burden of persuading the Administrator that the waiver request should be denied.<sup>29</sup>

The Administrator's burden, on the other hand, is to make a reasonable evaluation of the information in the record in coming to the waiver decision. As the court in *MEMA I* stated: "here, too, if the Administrator ignores evidence demonstrating that the waiver should not be granted, or if he seeks to overcome that evidence with unsupported assumptions of his own, he runs the risk of having his waiver decision set aside as 'arbitrary and capricious.'"<sup>30</sup> Therefore, the Administrator's burden is to act "reasonably."<sup>31</sup>

With regard to the standard of proof, the court in *MEMA I* explained that the Administrator's role in a section 209 proceeding is to:

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<sup>28</sup> *MEMA I*, 627 F.2d at 1110 (citing H.R.Rep. No. 294, 95 Cong., 1st Sess. 301-02 (1977)).

<sup>29</sup> *MEMA I*, *supra* note 19, at 1121.

<sup>30</sup> *Id.* at 1126.

<sup>31</sup> *Id.* at 1126.

[...]consider all evidence that passes the threshold test of materiality and \*  
\* \* thereafter assess such material evidence against a standard of proof to  
determine whether the parties favoring a denial of the waiver have shown  
that the factual circumstances exist in which Congress intended a denial of  
the waiver.<sup>32</sup>

In that decision, the court considered the standards of proof under section 209 for the two findings related to granting a waiver for an “accompanying enforcement procedure.”

Those findings involve: (1) whether the enforcement procedures impact California’s prior protectiveness determination for the associated standards, and (2) whether the procedures are consistent with section 202(a). The principles set forth by the court, however, are similarly applicable to an EPA review of a request for a waiver of preemption for a standard. The court instructed that “the standard of proof must take account of the nature of the risk of error involved in any given decision, and it therefore varies with the finding involved. We need not decide how this standard operates in every waiver decision.”<sup>33</sup>

With regard to the protectiveness finding, the court upheld the Administrator’s position that, to deny a waiver, there must be “clear and compelling evidence” to show that proposed enforcement procedures undermine the protectiveness of California’s standards.<sup>34</sup> The court noted that this standard of proof also accords with the congressional intent to provide California with the broadest possible discretion in setting regulations it finds protective of the public health and welfare.<sup>35</sup>

With respect to the consistency finding, the court did not articulate a standard of proof applicable to all proceedings, but found that the opponents of the waiver were unable to meet their burden of proof even if the standard were a mere preponderance of

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<sup>32</sup> *Id.* at 1122.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

the evidence. Although *MEMA I* did not explicitly consider the standards of proof under section 209 concerning a waiver request for “standards,” as compared to a waiver request for accompanying enforcement procedures, there is nothing in the opinion to suggest that the court’s analysis would not apply with equal force to such determinations. EPA’s past waiver decisions have consistently made clear that: “[E]ven in the two areas concededly reserved for Federal judgment by this legislation – the existence of ‘compelling and extraordinary’ conditions and whether the standards are technologically feasible – Congress intended that the standards of EPA review of the State decision to be a narrow one.”<sup>36</sup>

*F. EPA’s Administrative Process in Consideration of California’s SORE Amendment Requests for Authorization*

On May 28, 2014, EPA published a *Federal Register* notice announcing its receipt of California’s authorization request. In that notice, EPA invited public comment on each of the 2008 amendments and an opportunity to request a public hearing.<sup>37</sup>

First, EPA requested comment on the 2008 amendments, as follows: (1) Should California’s 2008 SORE amendments be considered under the within-the-scope analysis, or should they be considered under the full authorization criteria?; (2) If those amendments should be considered as a within-the-scope request, do they meet the criteria for EPA to grant a within-the-scope confirmation?; and (3) If the amendments should not be considered under the within-the-scope analysis, or in the event that EPA determines they are not within the scope of the previous authorization, do they meet the criteria for

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<sup>36</sup> See, e.g., “California State Motor Vehicle Pollution Control Standards; Waiver of Federal Preemption,” 40 FR 23102 (May 28, 1975), at 23103.

<sup>37</sup> See “California State Nonroad Engine Pollution Control Standards; Small Off-Road Engines; Request for Within-the-Scope and Full Authorization; Opportunity for Public Hearing and Comment,” 79 FR 30610 (May 28, 2014).

making a full authorization determination?

EPA received one anonymous written comment that opposed “any new Regulation or Rule promulgated by EPA on California State Non Road Engine Pollution Control Standards: Small off-Road Engines Regulations.”<sup>38</sup> EPA is not promulgating any regulations or rules regarding California’s SORE regulations, but rather is adjudicating whether or not the amendments that CARB made to its own SORE regulations are within the scope of previous authorizations granted by EPA or fulfill the criteria for a full authorization under the Clean Air Act. EPA received no requests for a public hearing. Consequently, EPA did not hold a public hearing.

## **II. Discussion**

### *A. California’s 2008 SORE Amendments*

The 2008 amendment package contains three amendments: (1) the modification of certification emission credits and creation of ZEE certification emissions credits; (2) the modification of production emission credits; and (3) the addition of an ethanol blend certification fuel option.

#### **1. Modification of Certification Emission Credits and Creation of ZEE Certification Emissions Credits**

California’s request for authorization of the amendments limiting the lifetime of certification emissions credits to five years and permitting emissions credit generation for ZEE are interrelated, and therefore will be treated together in this discussion. As explained by CARB in its 2013 authorization request, certification emissions credits under the pre-2008 regime “continued in existence even after the engines that had generated the emission credits had been taken out of service.” Thus, “[i]nstead of using

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<sup>38</sup> See EPA-HQ-OAR-2014-0036-0016.

catalysts and other advanced technologies on the more challenging engine families, a small number of manufacturers have often been able to use banked credits to . . . delay implementation of cleaner technology.”<sup>39</sup> CARB found that the certification emissions credit program achieved only mixed results in promoting the development of lower-emissions engines. Certification emissions credits were generated at an unexpectedly high rate, and, because the credits did not expire, they could be banked for an indefinite period of time. In sum, CARB determined that the program failed to meet its goal of providing incentives to create advanced, low-emissions engine technology.<sup>40</sup>

Similarly, CARB found that its SORE regulation, prior to the amendments, did not appropriately incentivize the creation of professional grade ZEE.<sup>41</sup> As a result, CARB’s 2008 Amendments introduced emissions credit generation for ZEE technology. These credits must also be used within five years of generation, and cannot be used to certify engines that exceed the relevant emissions standard by more than 40 percent.<sup>42</sup> California requested that these amendments be treated as within the scope of EPA’s prior authorizations of the SORE program.

California asserted that the amendments met all three within-the-scope criteria, i.e. that the amendments: (1) do not undermine the original protectiveness determination underlying California’s SORE regulations; (2) do not affect the consistency of the SORE regulations with section 202(a); and (3) do not raise any new issues affecting the prior authorizations.<sup>43</sup> We received no adverse comments or evidence suggesting a within-the-

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<sup>39</sup> 2013 Request, *supra* note 1, at 8-9.

<sup>40</sup> *Id.* at 7-8.

<sup>41</sup> *Id.* at 9-10.

<sup>42</sup> *Id.* at 10.

<sup>43</sup> *Id.* at 16.

scope analysis is inappropriate, or that the 2008 Amendments fail to meet any of the three criteria for within-the-scope confirmation.

In regard to the first within-the-scope criterion, California asserts that the amendment establishing a five-year restriction on certification emissions credits did not undermine the original protectiveness determination underlying California's SORE regulations because it does not modify the emissions standards applicable to engines, but rather only the credit program which is ancillary to these standards.<sup>44</sup> Limiting the lifespan of certification emissions credits reduces the ability of manufacturers to use banked credits from one engine family to certify another, dirtier engine family. EPA finds that because California's pre-2008 certification emissions credit program was at least as protective as the applicable federal standards, so too is the less generous certification emissions credit policy, as established by the 2008 Amendments.

EPA also finds that permitting the creation of emissions credits through ZEE technology, particularly given the five year credit expiration and limitation on the purposes for which the credits can be used, will promote advanced technology. We cannot therefore find that limiting the lifespan of certification emissions credits and extending emissions credits to ZEE products undermines the protectiveness determination that EPA found in its previous SORE authorizations not to be arbitrary and capricious.

In regard to the second within-the-scope criterion, this amendment did not attempt to regulate new motor vehicles or motor vehicles engines and so is consistent with section 209(a). It likewise did not attempt to regulate any of the permanently preempted engines or vehicles, and so is consistent with section 209(e)(1). Finally, it did not cause any

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<sup>44</sup> *Id.*



technological feasibility issues for manufacturers or cause inconsistency between state and federal test procedures, per section 209(b)(1)(C). Most manufacturers have been able to meet the requirements of CARB's SORE amendments using widely available technologies, and no evidence has been offered that any manufacturer would experience significant compliance issues because the credits will be limited to five years.<sup>45</sup> The amendment allowing manufacturers to generate emissions credits through ZEE technology will provide additional compliance options, thus posing no barrier to compliance.

In regard to the third within-the-scope criterion, California stated that no new issues exist, and EPA has received no evidence to the contrary.<sup>46</sup> Limiting the lifespan of certification emissions credits and permitting the creation of credits through ZEE technology does not modify emissions requirements, but instead makes changes to the alternate means used for compliance. We therefore do not find any new issues raised by the amendments limiting the lifespan of certification emissions credits and permitting the creation of emissions credits through ZEE technology.

Having received no contrary evidence regarding these amendments, we find that California has met the three criteria for a within-the-scope authorization approval, and the modification of certification emission credits and creation of ZEE certification emissions credits amendments are confirmed as within the scope of previous EPA authorizations of California's SORE regulations.

## 2. Modification of Production Emissions Credits

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<sup>45</sup> *Id.* at 19.

<sup>46</sup> *Id.* at 20.

Another California 2008 SORE amendment eliminated production emissions credits. These credits were generated when a manufacturer produced an engine whose production line test result was below the applicable engine family emission limit. Through these credits, CARB intended to permit manufacturers to “certify engine families as well as to offset production line testing exceedances of another engine family.”<sup>47</sup> CARB states that production emissions credits were implemented in anticipation of EPA’s adoption of a similar program.<sup>48</sup> EPA ultimately decided not to implement production emissions credits. Thus elimination of this program through the 2008 Amendments will more closely harmonize California’s regulations with federal standards.

The production emissions credit program permitted manufacturers to convert production emissions credits into certification emissions credits. CARB found that some manufacturers accumulated a large amount of production emissions credits and converted them into certification emissions credits.<sup>49</sup> This unexpectedly resulted in the continued production of engines that did not comply with otherwise applicable emissions standards.<sup>50</sup> CARB’s 2008 Amendments eliminated the production emissions credits program, but permitted manufacturers one year to use their production credits or convert them to certification emissions credits.<sup>51</sup> EPA received no adverse comments or evidence contradicting California’s request to consider this amendment as within the scope of previous authorizations.

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<sup>47</sup> *Id.* at 11.

<sup>48</sup> *Id.*; *see also* 64 FR 15208 (March 30, 1999) and 73 FR 59034 (October 8, 2008).

<sup>49</sup> 2013 Request, *supra* note 1, at 12.

<sup>50</sup> *Id.* at 12.

<sup>51</sup> *Id.*

In regard to the first within-the-scope criterion, California found that the elimination of production emissions credits did not undermine the original protectiveness determination regarding its SORE regulations because it increases harmony with the federal system.<sup>52</sup> Based on the evidence before the Agency and in the absence of any evidence to the contrary, we cannot find that California's protectiveness determination regarding the elimination of production emissions credits is arbitrary or capricious.

In regard to the second within-the-scope criterion, this amendment did not attempt to regulate new motor vehicles or motor vehicles engines, and thus is consistent with section 209(a). It similarly did not attempt to regulate any of the permanently preempted engines or vehicles, and so is consistent with section 209(e)(1). It did not cause any technological feasibility issues for manufacturers or cause inconsistency between state and federal test procedures, per section 209(b)(1)(C). CARB stated that no manufacturer has relied upon production emissions credits to comply with applicable emissions standards since 2008.<sup>53</sup> As no contrary evidence has been offered, we do not find the amendment is inconsistent with section 209 of the Act.

In regard to the third within-the-scope criterion, CARB stated that it was not aware of any new issues presented by the elimination of production emissions credits, and we have received no evidence to the contrary. We therefore do not find any new issues raised by the elimination of production emissions credits.

Having received no contrary evidence regarding this amendment, we find that California has met the three criteria for a within-the-scope authorization approval, and the

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<sup>52</sup> *Id.* at 11.

<sup>53</sup> *Id.* at 12.

modification of production emissions credits amendment is confirmed as within the scope of previous authorizations of California's SORE regulations.

### 3. Ethanol Blend Certification Fuel Option

Finally, one of the 2008 Amendments granted manufacturers the option to "use a certification fuel with up to ten percent ethanol content when that same fuel is used for certification with the EPA."<sup>54</sup> EPA received no adverse comments or evidence contradicting California's request to consider this amendment as within the scope of previous authorizations.

In regard to the first within-the-scope criterion, CARB stated that this amendment would increase "harmonization of California's SORE certification procedures with EPA's nonroad engine certification procedures, and could reduce the testing cost for some manufacturers."<sup>55</sup> Based on the record before us and in the absence of any evidence to the contrary, we cannot find that California's protectiveness determination regarding the implementation of an ethanol blend certification fuel option is arbitrary or capricious.

In regard to the second within-the-scope criterion, California found that the amendment does not affect consistency with section 209 of the Act.<sup>56</sup> This amendment does not regulate emissions from new motor vehicles or new motor vehicle engines, and thus is not inconsistent with 209(a). Similarly, it did not attempt to regulate any of the permanently preempted engines or vehicles, and so is consistent with section 209(e)(1). This amendment expands rather than limits the means by which manufacturers can certify fuels, and thus poses no lead-time or technological feasibility problems. We therefore find no evidence that this amendment is inconsistent with section 209 of the Act.

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<sup>54</sup> *Id.* at 13.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 17-18.

In regard to the third within-the-scope criterion, California stated that the ethanol blend certification fuel option raised no new issues.<sup>57</sup> EPA similarly finds no new issues arising from the amendment.

Having received no contrary evidence regarding this amendment, we find that California has met the three criteria for a within-the-scope authorization approval, and the ethanol blend certification fuel option amendment is confirmed as within the scope of previous authorizations of California's SORE regulations.

### **III. Decision**

The Administrator has delegated the authority to grant California section 209(e) authorizations to the Assistant Administrator for Air and Radiation. After evaluating the 2008 Amendments to CARB's SORE regulations described above and CARB's submissions for EPA review, EPA is taking the following actions.

First, EPA confirms that California's amendment modifying certification emissions credits and permitting emissions credit generation for ZEE is within the scope of prior authorizations. Second, EPA confirms that California's amendment eliminating production credit generation is within the scope of prior authorizations. Third, EPA confirms that California's amendment permitting certification with fuels with up to ten percent ethanol content provided that the same fuel is used for certification with EPA is within the scope of prior authorizations.

This decision will affect persons in California and those manufacturers and/or owners/operators nationwide who must comply with California's requirements. In addition, because other states may adopt California's standards for which a section 209(e)(2)(A) authorization has been granted if certain criteria are met, this decision

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<sup>57</sup> *Id.* at 20.

would also affect those states and those persons in such states. See CAA section 209(e)(2)(B). For these reasons, EPA determines and finds that this is a final action of national applicability, and also a final action of nationwide scope or effect for purposes of section 307(b)(1) of the Act. Pursuant to section 307(b)(1) of the Act, judicial review of this final action may be sought only in the United States Court of Appeals for the District of Columbia Circuit. Petitions for review must be filed by [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Judicial review of this final action may not be obtained in subsequent enforcement proceedings, pursuant to section 307(b)(2) of the Act.

#### **IV. Statutory and Executive Order Reviews**

As with past authorization and waiver decisions, this action is not a rule as defined by Executive Order 12866. Therefore, it is exempt from review by the Office of Management and Budget as required for rules and regulations by Executive Order 12866.

In addition, this action is not a rule as defined in the Regulatory Flexibility Act, 5 U.S.C. § 601(2). Therefore, EPA has not prepared a supporting regulatory flexibility analysis addressing the impact of this action on small business entities.

Further, the Congressional Review Act, 5 U.S.C. 801, *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, does not apply because this action is not a rule for purposes of 5 U.S.C. 804(3).

Dated: April 29, 2015.

Janet G. McCabe  
Acting Assistant Administrator  
Office of Air and Radiation  
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